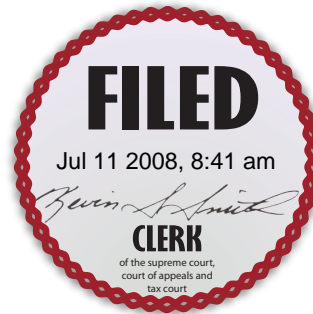


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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TRAVIS N. TURNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A02-0710-PC-887
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

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APPEAL FROM THE HAMILTON CIRCUIT COURT  
The Honorable Judith S. Proffitt, Judge  
Cause No. 29C01-0407-FB-063

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**July 11, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Travis Turner appeals the denial of his motion for pre-sentence incarceration credit for time he spent at New Life Recovery Home for Men (“New Life”). We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On July 29, 2004, Turner was charged with dealing in a narcotic drug, a Class B felony, and possession of a narcotic drug, a Class D felony.<sup>1</sup> The initial hearing was held March 7, 2005. Turner was released on his own recognizance, with special conditions, on March 18, 2005. The special conditions included:

[D]efendant shall remain at New Life Recovery Home at 224 South Lebanon Street, Lebanon, Indiana unless he receives prior written approval from the court to reside elsewhere; defendant shall continue to receive counseling while at New Life Recovery Home . . . . [I]f the Defendant is released from New Life Recovery Home, the defendant shall continue with treatment with New Life Recovery Home, complying with all treatment recommendations.

(Appellant’s App. at 11.)

Turner agreed to plead guilty to dealing in a narcotic drug, a Class B felony.<sup>2</sup> Under the terms of the plea agreement, Turner would plead guilty to that charge and the State would dismiss the possession charge. In the plea agreement the State made a sentencing recommendation, which provided “Defendant given 26 total days credit for 13 days already served and attributable to this case as of the date of sentencing.”

(Appellant’s App. at 5.)

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<sup>1</sup> Ind. Code § 35-48-4-6.

<sup>2</sup> I.C. § 35-48-4-1.

The trial court accepted the plea agreement and adopted the State's sentencing recommendation. It sentenced Turner to twelve years imprisonment, six years executed and six years suspended, and three years probation. The last two years of the executed portion of the sentence were to be served in a work release program. The sentence was to be served concurrent with a similar conviction from Boone County.

On December 13, 2006, Turner requested credit for time he spent at New Life from March 18, 2005 to March 17, 2006. The State objected and the trial court denied the motion for credit time on January 30, 2007.

On July 12, 2007, Turner again sought credit for time spent at New Life. The State again objected and the trial court denied Turner's second motion on August 9, 2007.

### **DISCUSSION AND DECISION**

A person earns one day of credit time for each day imprisoned for a crime or confined awaiting trial or sentencing. I.C. § 35-50-6-3(a). Pre-sentence credit time is a statutory right and trial courts do not have discretion to grant or deny such credit. *Williams v. State*, 759 N.E.2d 661, 664 (Ind. Ct. App. 2001). Determination of pretrial credit time "is dependent upon 1) pretrial confinement, and 2) the pretrial confinement being a result of the criminal charge for which sentence is being imposed." *Bischoff v. State*, 704 N.E.2d 129, 130 (Ind. Ct. App. 1998), *trans. denied*. If a person is confined while awaiting trial on more than one charge and is sentenced to concurrent terms, he is entitled to receive credit time applied against each separate term. *Weaver v. State*, 725 N.E.2d 945, 948 (Ind. Ct. App. 2000).

The State first argues Turner waived his right to any pre-sentence credit time not included in his plea agreement. We disagree.<sup>3</sup> A plea agreement is “contractual in nature, binding the defendant, the state and the trial court.” *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994); *State ex rel. Goldsmith v. Marion County Superior Court, Criminal Division No. 1*, 419 N.E.2d 109, 114 (Ind. 1981) (“The concept of plea bargaining contemplates an explicit agreement between the State and defendant which is binding upon both parties when accepted by the trial court.”). However, a defendant can challenge a sentence when the trial court had discretion in the sentencing. *Allen v. State*, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007). To the extent the plea agreement’s sentencing provision reflected only the State’s “recommendation,” (App. at 5), we decline to hold the trial court had no discretion in sentencing Turner<sup>4</sup> and Turner is not precluded from challenging his sentence.

The State next argues bail statutes govern Turner’s time at New Life because his placement there was a special condition of his release on bond.<sup>5</sup> We need not determine

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<sup>3</sup> The State also argues Turner’s claim is barred by *res judicata*. The record does not demonstrate the State raised *res judicata* as an affirmative defense to Turner’s second motion for pre-sentence credit time. “A party who has failed to plead or prove a [Trial] Rule 8(C) affirmative defense has no right to prevail on that basis” and has waived the issue for appeal. *Bunch v. State*, 778 N.E.2d 1285, 1289 (Ind. 2002). We accordingly decline to address that argument.

<sup>4</sup> Other provisions of the agreement indicate the court could have imposed a sentence different from that recommended by the State.

<sup>5</sup> The State directs us to I.C. § 35-33-8-3.1; however, this statute was repealed in 1998. The applicable bail statute is I.C. § 35-33-8-3.2. We note this statute was amended in 2008, but no changes were made to the subsections pertinent to this discussion.

I.C. § 35-33-8-3.2(a)(3) permits courts to “[i]mpose reasonable restrictions on the activities, movements, associations, and residence of the defendant during the period of release.” If these restrictions rise to the level of pre-sentence confinement, the defendant would become eligible for pre-

whether the bail statutes control because the record does not reflect Turner was “confined” at New Life. Determination of pretrial credit depends on (1) pretrial confinement, and (2) the pretrial confinement being a result of the criminal charge for which sentence is imposed. *Payne v. State*, 838 N.E.2d 503, 510 (Ind. Ct. App. 2005), *trans. denied* 855 N.E.2d 998 (Ind. 2006). Pretrial confinement consists of time served in “a prison, jail or other facility which imposes substantially similar restrictions upon personal liberty.” *Purcell v. State*, 721 N.E.2d 220, 224 n.6 (Ind. 1999), *reh’g denied*. Thus, Turner would be eligible for credit time under pre-sentence credit time statutes only if New Life imposed restrictions on Turner’s personal liberty substantially similar to restrictions of prison or jail.

The record does not reflect Turner’s personal liberty was restricted during his time at New Life in such a manner as to constitute confinement. During his time at New Life, Turner worked forty hours per week at a local Wendy’s, regularly attended church each Sunday, spent time with his family and friends, and was given a number of responsibilities at the facility. We accordingly cannot say the trial court abused its discretion to the extent its denial of credit time was premised on the absence of “confinement.” *See James v. State*, 872 N.E.2d 669, 672 (Ind. Ct. App. 2007) (trial court is within its discretion to deny a defendant credit toward sentence for pre-trial time served on home detention). *And see Molden v. State*, 750 N.E.2d 448, 451 (Ind. Ct. App. 2001)

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sentence credit time. *See Purcell v. State*, 721 N.E.2d 220, 224 n.6 (Ind. 1999) (defendant is entitled to credit toward sentence for pre-trial time served in a prison, jail or other facility that imposes substantially similar restrictions upon personal liberty), *reh’g denied*.

(time spent in pretrial home detention is not equivalent to pretrial time served in a prison or jail, and pretrial home detainees are not entitled as a matter of law to credit for time served on home detention), *reh'g denied*. Accordingly, Turner is not entitled to pretrial credit time for his time spent at New Life.

Affirmed.

RILEY, J., and KIRSCH, J., concur.